

立法會
Legislative Council

LC Paper No. LS12/08-09

**Paper for the meeting of the Subcommittee on
Employees Retraining Ordinance (Amendment of Schedule 3) Notice 2008**

Comments on Matters Raised by Members

Background

This paper sets out the views of the legal adviser to the Subcommittee on the following matters raised by members of the Subcommittee on Employees Retraining Ordinance (Amendment of Schedule 3) Notice 2008 (the Amendment Notice) :-

- (a) whether deleting sections 1(2) and 2(2) of the Amendment Notice or extending the suspension on Employees Retraining Levy (Levy) would have any charging effect;
- (b) whether the Levy suspension period could be extended or repealed; and
- (c) whether the Levy suspension could be confined to the importation of foreign domestic helpers (FDHs).

Charging Effect

2. Rule 31 of the Rules of Procedure provides that a motion or amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charges any part of the revenue or other public moneys of Hong Kong shall be proposed only by the Chief Executive; or a designated public officer; or a Member, if the Chief Executive consents in writing to the proposal.

3. The Employees Retraining Board (the Board) is established under section 3 of the Employees Retraining Ordinance (Cap. 423) (the Ordinance) as a body corporate. One of the functions of the Board is to hold the Employees Retraining Fund (the Retraining Fund), which is established under section 6 of the Ordinance. The Board is given powers under the Ordinance to maintain and manage the Retraining Fund. The Retraining Fund is vested in the Board and consists of the Levy and other moneys received by the Board, including any moneys provided by the Government. The Board may make payment out from the Fund to training providers

in respect of trainees receiving retraining allowances and to cover other expenses of the Board and for other specified purposes.

4. The effect of the Amendment Notice is similar to a motion sought to be moved by Hon LEE Cheuk-yan in July 1998 to amend the motion proposed to be moved by the then Secretary for Education and Manpower, which was passed and published in the Gazette as L.N.286/1998. The effect of the amendment by Hon LEE Cheuk-yan is to raise the compensation for bereavement under section 5A of the Pneumoconiosis (Compensation) Ordinance (Cap. 360) (PCO) from \$70,000 to \$150,000 as stipulated in the Part V of First Schedule to PCO, as against the Administration's proposed increase of the compensation to \$100,000. Such compensation is paid out from the Pneumoconiosis Compensation Fund (the Compensation Fund) established under section 27 of PCO. According to section 27 of PCO, the Compensation Fund :-

- (a) consists of, among other things, any moneys recovered by way of levy, surcharge, penalty and further penalty, and any other moneys lawfully received by the Board for its purposes; and
- (b) shall be vested in the Pneumoconiosis Compensation Fund Board.

5. The Administration opposed the admission of the amendment for consideration by the Council, arguing that the compensation made under PCO is funded by a levy imposed under section 35 of PCO. The Government is liable to pay the levy under certain circumstances. The amendment of Hon LEE Cheuk-yan may result in an increase in levy and thus the Government may be required to incur increased expenditure.

6. The Administration further argued that the amendment may result in a depletion of the Compensation Fund, leaving the Government with no choice but to inject public money into it.

7. In her ruling dated 20 July 1998 (at Annex I), the then President, rejected the Administration's arguments and ruled that, among other things, the Compensation Fund is a statutory fund and not the revenue of the Government. Any consequence on the Fund, incidental or direct, would not have any charging effect on general revenue.

8. The Retraining Fund, like the Compensation Fund, is vested in a statutory body corporate. Money may be paid out from both funds for specific statutory purposes and they are maintained and managed by the statutory body corporate concerned. Similar to the Compensation Fund, the Retraining Fund may not be regarded as "revenue or other public moneys" of Hong Kong. In the light of the aforesaid ruling, any amendment in respect of the levy which has a consequence on the Retraining Fund should likewise have no charging effect on general revenue under Rule 31 of the Rules of Procedure.

9. Having said that, Rule 31 provides that the opinion as to whether an amendment has charging effect has to be formed by the President. It is established practice that before forming his opinion, the President will seek the views of the Administration and the member concerned, as well as Counsel to the Legislature.

Extension or Repeal of the Suspension Period

10. Section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that subsidiary legislation may be amended in any manner whatsoever consistent with the power to make such subsidiary legislation.

11. During the first reading of the Employees Retraining Bill on 24 June 1992, the Secretary for Education and Manpower said that "[t]he setting up of a statutory retraining fund financed by a levy imposed on employers who import workers will channel additional resources to augment the provision of retraining for local workers."

12. It is also noted that the Long Title of the Ordinance also provides that :-

"An Ordinance to establish the Employees Retraining Board as a body corporate, to establish the Employees Retraining Fund, to provide for the imposition of a levy payable by employers who employ imported employees, and to provide for the collection of the levy by the Director of Immigration from those employers in respect of those employees and the remittance of the levy to the Board for the purposes of the Fund..."

13. Part IV of the Ordinance specifically deals with the imposition and payment of Levy. Section 14(1) of the Ordinance makes it a mandatory requirement for an employer to pay the Levy to the Director of Immigration of each employee to be employed and granted a visa. The Levy shall be the sum specified in Schedule 3, which can be amended by the Chief Executive in Council under section 31 of the Ordinance.

14. It appears that it would accord with the legislative intent of the Ordinance to regard the Levy as intended to be a source of income of the Fund under the Ordinance. Section 31 of the Ordinance should be interpreted in this light. This may suggest an argument that abolition of the Levy can only be done by amending the Ordinance, i.e. a bill, but not by subsidiary legislation made under section 31.

15. The effect of extending or repealing the suspension period in the Amendment Notice only affects the period. It does not abolish the Levy. As such, extending or repealing the suspension period may not necessarily be inconsistent with the power of making the Amendment Notice under the Ordinance. Any such

amendment does not prevent the Chief Executive in Council to make another notice under section 31 of the Ordinance to vary the suspension period.

Whether the Levy Suspension could be confined to Foreign Domestic Helpers

16. Section 14(1) of the Ordinance provides that the Levy shall be payable by an employer to the Director of Immigration in respect of each imported employee to be employed by him under a contract of employment and granted a visa.

17. Under section 14(3) of the Ordinance, the Chief Executive in Council may, from time to time, approve a scheme under the terms of which the Levy shall be payable by employers. The importation of FDHs was designated as such a labour importation scheme by the Chief Executive in Council with effect from 1 October 2003. Members may refer to the Legislative Council Brief issued by the Economic Development and Labour Bureau (Labour Branch) dated 26 February 2003 (File Ref.: EDLB/LB/C/36/02).

18. In Julita F. Raza and others v Chief Executive in Council and others CACV218/2005, at paragraph 46, the Court of Appeal held that the designation by the Chief Executive in Council is an executive or administrative act. The designation is not a legislative scheme.

19. One way of suspending the Levy imposed on employers of FDHs is for the Chief Executive in Council to exercise his executive power to remove the designation of FDHs as a labour importation scheme for a period of 2 years. However, this option is only available to the Chief Executive in Council.

20. To suspend the Levy imposed on the employers of FDHs by the Amendment Notice, an amendment may be drafted in a way that the Amendment Notice should only apply to the labour importation scheme concerning FDHs. As the Levy is only payable by employers of a designated labour importation scheme, to suspend the Levy on FDHs only is unlikely to be inconsistent with the power to make the Amendment Notice.

Encl

Prepared by
Kelvin Ka-yun LEE
Assistant Legal Adviser
3 November 2008

**Ruling by the President on
whether there is charging effect in Hon LEE Cheuk-yan's amendment to
the Administration's resolution under the
Pneumoconiosis (Compensation) Ordinance, Cap. 360**

Hon LEE Cheuk-yan has given notice to move an amendment to the Secretary for Education and Manpower's resolution to be moved under the Pneumoconiosis (Compensation) Ordinance (the Ordinance) at the Council meeting on 22 July 1998. Mr LEE's amendment seeks to raise the compensation for bereavement from \$70,000 to \$150,000, as against the Administration's proposed increase of the compensation to \$100,000.

The Administration's views

2. The Secretary for Education and Manpower claims that Mr LEE's amendment will have charging effect as described in Rule 31 of the Rules of Procedure of the Legislative Council. His reasons are set out in paragraphs 3 to 5 below.
3. Compensation made under the Ordinance is funded by a levy imposed on the construction works undertaken and quarry products produced in Hong Kong, which have a value above \$1 million. The Government is liable to paying the levy through the tendered contract prices to the contractors and quarry operators concerned for its construction projects. Mr LEE's amendment may result in an increase in levy and the Government may be required to incur increased expenditure through higher contract prices.
4. It has been the Government's policy to revise the levels of compensation under the Pneumoconiosis Ex-Gratia Scheme in step with the revision of levels of compensation under the Ordinance. Mr LEE's amendment may result in a depletion of the fund in the Scheme, leaving the Government with no choice but to inject public money into it.
5. The Secretary quotes from Eskiné May that a charge upon public funds (revenue) or upon the people (taxation or levy) cannot be considered by the legislature unless it is demanded by or recommended from the Crown. As the Secretary is of the view that Mr LEE's proposed amendment has charging effect, he therefore thinks that the amendment requires the recommendation of the Government.

Counsel to the Legislature's Opinion

6. The Counsel to the Legislature advises that the legal effect of Mr LEE's amendment, if passed, would be to increase the amount of compensation for bereavement from \$70,000 to \$150,000 instead of \$100,000 as proposed in the original resolution. The payment of compensation is a statutory obligation imposed on the Pneumoconiosis Compensation Fund. There is no statutory mechanism in the Ordinance to peg the level of levy to the amounts of compensation.

7. He further advises that section 27(b) of the Ordinance does not have the legal effect of requiring the Government to provide money to the Fund.

My Analysis

8. Having considered the Administration's views and the advice of the Counsel to the Legislature, I am of the opinion that Mr LEE's amendment will not have charging effect within the meaning of Rule 31 of the Rules of Procedure. I cannot accept the Administration's claim that the increased compensation for bereavement as proposed in Mr LEE's amendment would directly "require an increase in the levy" payable by contractors and quarry operators. And even if it were decided that the levy payable by contractors should be increased, contractors do not necessarily pass on the increased portion of the levy to their clients, who include the Government.

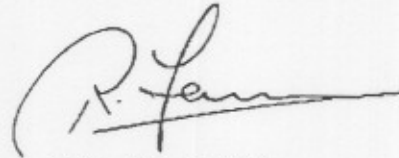
9. Although it is the policy of the Government to bring the level of compensation under the Pneumoconiosis Ex-Gratia Scheme in line with that under the Ordinance, it is not bound by law to do so. I therefore do not consider that Mr LEE's amendment will have the legislative effect of increasing Government's expenditure on the Pneumoconiosis Ex-Gratia Scheme.

10. Rule 31 of the Rules of Procedure refers to revenue or other public moneys of Hong Kong. Since the Pneumoconiosis Compensation Fund is a statutory fund and not the revenue of the Government, any consequence on the Fund, incidental or direct which I do not consider there is, would not have any charging effect on general revenue.

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The Ruling

11. For the reasons given in paragraphs 8 to 10 above, I rule that Mr LEE's amendment will not have charging effect within the meaning of Rule 31 of the Rules of Procedure.



(Mrs Rita FAN)

President

Legislative Council

20 July 1998